State Personnel Board, State of Colorado

Case No. 97 B 172

ORDER GRANTING PETITION FOR RECONSIDERATION, *IN PART*
and
AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JOHN RODGERS,

Complainant,

v.

DEPT. OF HUMAN SERVICES, COLORADO MENTAL HEALTH INSTITUTE AT PUEBLO,

Respondent.

On May 11, 1998, Respondent filed Respondent's Petition for Reconsideration ("Respondent's Petition") of the Initial Decision of the Administrative Law Judge issued May 1, 1998. Complainant filed Complainant's Response to Respondent's Petition for Reconsideration ("Complainant's Response") on May 21, 1998.

I. PETITION FOR RECONSIDERATION

1. State Personnel Board Rule R10-9-3, 4 CCR 801-1 provides, in part:

   > Petitions for reconsideration shall be limited to matters assertedly overlooked or misunderstood by the administrative law judge and shall not contain other arguments.

2. Respondent's Petition requests the ALJ to reconsider the issue involving the ALJ's conclusion that "it cannot be found that Complainant failed to comply with standards of efficient service or competence or acted with willful misconduct in failing to seatbelt the male juvenile." (Initial Decision, Discussion, p. 19). Respondent argues that this conclusion is in conflict with the law set forth in *Bishop v. Dept. of Institutions*, 831 P.2d 506 (Colo. App. 1992). In *Bishop*, the court of appeals upheld the Board's determination that willful misconduct is not

limited to a violation of written or stated rules and can include violations of generally accepted standards of performance, violations of the general provisions of an established policy manual, and violations of Colorado Statutes.

3. Respondent further argues that as a police officer, Complainant should be held to a higher standard of professional conduct. Respondent requests that the ALJ consider reversing his decision and issue a new decision dismissing Complainant's appeal with prejudice and upholding the appointing authority's decision.

4. Complainant argues that the ALJ's conclusions were correct and that the Initial Decision should be affirmed. Complainant argues that because there is no policy, rule or law which clearly requires the restraining of juveniles by police officers of CMHIP during transport off grounds, that Complainant should not be held to any such standard. Complainant further states that the ALJ correctly exercised his authority to modify the discipline imposed by Respondent.

The Initial Decision is amended as follows:

II. AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

Hearing on this matter was held March 2 -3, 1998, before Administrative Law Judge G. Charles Robertson at the Colorado Mental Health Institute, Pueblo, CO.

MATTER APPEALED

Complainant appeals the disciplinary termination of his employment.

Complainant's actions of driving recklessly in the course of his search for two juveniles who had left CMHIP are actions for which corrective or disciplinary action may be imposed BUT the disciplinary termination was NOT within the range of reasonable alternatives available to the appointing authority and the discipline imposed was in violation of Board Rule R8-3-1, 4 CCR 801-1. Thus, Respondent's actions were arbitrary and capricious or contrary to rule or law.

PRELIMINARY MATTERS

Respondent, Colorado Mental Health Institute ("CMHIP" or "Respondent") was represented by Stacy Worthington, Assistant Attorney General. Complainant, John Rodgers ("Complainant" or "Rodgers") was represented by David J. Bruno, Attorney at Law.

1. Procedural History

Complainant filed a Notice of Appeal of his disciplinary termination on June 24, 1997. Complainant appealed the decision to terminate his employment on the grounds that he did ***not*** fail to comply with standards of efficient service, engage in willful misconduct, or violate the law, policies, rules or procedures relating to the State Personnel System in a manner which materially affected his ability to perform his job.

On November 27, 1997, this matter was commenced via telephone. This matter was originally set for hearing on December 15 - 17, 1997 before ALJ Margot Jones. However, due to the departure of ALJ Jones from the employ of the Board, this matter was re-assigned to ALJ G. Charles Robertson. As a result, the hearing was moved to March 2, 3 and 10, 1998. The parties attempted settlement through the settlement process but were unable to resolve the matter. The parties were able to stipulate to certain facts.

A stipulated protective order was entered on December 10, 1997 in order to protect the identities of the male and female juveniles involved in the incidents of April 16, 1997. That order included redacting the specific identity of each juvenile prior to the production of information, that documents produced with regard to such juveniles be marked confidential, and that any such documents are to be solely used in this administrative proceeding.

At the end of hearing, the ALJ requested that the parties submit briefs or legal memoranda on the application and effect of *res judicata* and/or collateral estoppel in an administrative setting. Those briefs were submitted on March 17, 1998. The hearing was deemed to have concluded at that time.

2. Witnesses

Respondent called 5 witnesses during its case-in-chief including: Guy Case, owner of Auto Glow Carwash, Pueblo, C0; (2) Arron Rosco, Roofer, Pueblo, CO; (3) Shannon M. Carpio, employee, Auto Glow Carwash, Pueblo, CO; (4) Deputy Chief Anthony Pinelle, Deputy Chief of Public Safety at CMHIP, Pueblo, CO; and (5) Chief Lee Smith, Chief of Dept. of Public Safety at CMHIP, Pueblo, CO. Respondent called Chief Smith during its rebuttal case.

Complainant called 4 witnesses which included: (1) Jerry McNeil, Store Manager, Country Kitchen, Pueblo, CO; (2) James Peaslee, Senior Employee Representative, C.A.P.E., Pueblo, CO; (3) Complainant, Pueblo, CO; and (4) Curtis Burchett, Deputy District Attorney, 10th Judicial District, Pueblo, CO.

3. Exhibits

With regard to the Respondent's exhibits, the parties stipulated to the admission of Exhibit 1. Exhibits 2, 6, and 12 were admitted into evidence without objection. Exhibits 3 - 5, 7 - 11, and 13 - 19 were stipulated into evidence for the purposes of showing only that an investigation occurred in the course of this matter. Exhibits 20 - 25 were not offered into evidence. Exhibit 26 was admitted by way of stipulation. Exhibits 27 - 41 were not offered into evidence. Exhibit 42 and 43 were admitted into evidence without objection. Exhibits 43 - 51 were not offered into evidence. Exhibits 52, 53, 54, 61, and 62 were admitted without objection.

Complainant's exhibits A - G were admitted by way of stipulation. Exhibits H1, H2 and H3 were admitted without objection. Exhibit H4 was admitted over objection. Judicial notice was taken of Exhibits J and K (copies of sections of Colorado Revised Statutes) with regard to the use of seatbelts and juveniles.

4. Sequestration Order

A sequestration order which instructed witnesses not to discuss this matter or their testimony with other witnesses during the course of the hearing was entered at the commencement of the hearing.

ISSUES

1. Whether Complainant engaged in the acts for which discipline was imposed;

2. Whether the discipline imposed was within the range of reasonable alternatives available to the appointing authority;

3. Whether the delegation of appointing authority was conducted pursuant to the State Personnel Board rules; and

4. Whether the actions of Respondent were otherwise arbitrary, capricious, or contrary to rule or law.

STIPULATED FACTS

1. JD and LG were patients at CMHIP's children and adolescents treatment unit.

2. On April 16, 1997, CMHIP patients JD and LG left the hospital grounds without authorization.

3. CMHIP police had permission from the guardians of patients JD and LG to find and return them to CMHIP if they left without authorization.

4. If necessary, CMHIP police could search for JD and LG off the hospital grounds.

5. Deputy Chief Anthony Pinelle, Investigator Joanne King, Investigator Erline Hobbs, Officer Kamlyn Wakely-Cook, and Officer Larry Ortiz would testify that they did not place messages directed at John Rodgers on the computer screen saver or were not aware of any such messages.

6. Officer John Madden saw a message that he believed was directed at John Rodgers, but he does not know who placed the message on the screen saver.

7. According to Officer Larry Ortiz, it was common for people to change messages on the screen saver.

8. James Mason, Richard Burns, Ray Kahler, Walt Scherman, Jeff Barela, Scott Braun, and Lou Archuleta would testify that they did not place messages directed at John Rodgers on the computer screen saver or were not aware of any such messages.

9. James Bowie, a mail carrier, would testify that on April 16, 1997, he observed Orlando Trujillo pursuing two juveniles at 29th and High. Bowie then saw a girl running across the street and saw Rodgers chasing the girl. At 7th and 29th, he saw Trujillo had a male in handcuffs. Bowie then got into his vehicle, spotted the girl at 5th and 28th, and waved Rodgers down. The girl was gone when the officers arrived. Bowie would further testify that during his contact with Rodgers, his demeanor was professional and controlled.

FINDINGS OF FACT

1. CMHIP is a mental health care facility which houses and treats adult and children with mental disorders. As a part of the facility, CMHIP employs its own security force or police department.

2. Complainant had been employed with CMHIP, in either a part-time or full-time capacity since 1987. Initially, he was a security officer. Subsequently, with a reorganization at CMHIP, he became a police officer I with CMHIP's Dept. of

Public Safety. He was promoted to police officer II and worked continuously in this position until June 1997, with the exception of a 5 month period in which he had been previously terminated. His responsibilities as a police officer II included lawfully driving a patrol vehicle and complying with the basic responsibilities of Policy 1.05.05 cited below.

3. Complainant's career has always involved law enforcement. He has been a volunteer and in the employ of the Pueblo County Sheriff's Department as a deputy and was in the United States Army Police Corp while enlisted in the armed services.

4. Complainant has received 2 corrective actions while employed and working at CMHIP in 1992 and 1994 respectively. As a part of the 1992 corrective action which involved damage to a CMHIP police vehicle, Complainant was directed to participate in remedial driver training. Such training consisted solely of an other officer from CMHIP riding along with Complainant for a 4 or 5 month period. The training was successfully completed.

5. During the course of his employment with CMHIP, Complainant received the following overall job evaluations:

Date	Position	Overall Rating
December 1987	Public Safety Grd II	Standard
November 1988	Public Safety Grd. II	Above Standard
June 1989	Forensic Security Officer	Above Standard
November 1989	Campus/Inst. Police Officer B	Above Standard
October 1989	Forensic Security Officer	Above Standard
June 1991	Camp/Inst. Police Officer B	Commendable
June 1992	Camp/Inst. Police Officer B	Commendable
January 1993	Camp/Inst. Police Officer B	Outstanding
June 1993	Sr. Campus Inst. Police Officer	Outstanding
September 1994	Camp/Inst. Police Officer B	Commendable
June 1995	Camp/Inst. Police Officer B	Commendable
July 1996	Police Officer II	Commendable
July 1997	Police Officer II	Needs Improvement

6. No narrative comments were made regarding Complainant's performance in any of these evaluations except for the evaluation completed July 1997 and which involves matters at issue. Commendations were received by Complainant in July 1991, February 1992, July 1992, December 1993, January 1994, July 1994, August 1995, and July 1996. Such commendations included correspondence (1) expressing appreciation of Complainant's appropriate interaction with CMHIP employees and residents, and (2) his abilities in de-escalating hazardous situations.

7. In or about 1994, Complainant had filed a grievance with CMHIP claiming that he was experiencing harassment as a result of issues with management involving the use and type of a "flack"/bullet proof vest, the nature and types of assignments he was receiving, and untimely performance evaluations.

8. As a result of events in August 1994 involving the allegations of the use of excessive force in attempting to restrain a combative patient, Complainant was terminated. In March 1995, an ALJ determined that Complainant was wrongfully terminated and Complainant was reinstated as a police officer II at CMHIP.

9. On April 16, 1997, Complainant and Sgt. Orlando Trujillo ("Trujillo") were on duty at CMHIP and received a report of two juveniles (JD and LG) missing from Joyce Archuleta, Police Communications Technician (dispatch) at CMHIP. Each officer had his own CMHIP vehicle. One juvenile was a male, the other was female.

10. Juveniles can be voluntarily admitted to CMHIP or committed pursuant to court order. If voluntarily admitted, the parents or legal guardians of the juveniles can request that in the event their child leaves the premises, that the child be returned by CMHIP staff. The standard of practice at CMHIP is to retrieve any juveniles. At the same time, Complainant was aware of the policy that officers in the field were to request information from the CMHIP dispatcher as to whether or not instructions had been provided to return a child who was absent without leave. Neither Trujillo nor Complainant requested such information.

11. Complainant and Trujillo first searched CMHIP's grounds. The search was expanded beyond CMHIP's grounds into the surrounding neighborhood. After having obtained some information as to the juveniles' possible whereabouts from a U.S. postal worker delivering mail, Complainant drove by Fairmount Park and noticed an adult sized person standing at one edge of the park.

12. Fairmont Park is bordered on the west by Franklin Street, on the south by 29th Street, and on the east by Colfax street.

13. In an attempt to identify the person, but in order to prevent the flight of the person in the event it was one of the juveniles, Complainant entered the park's parking lot, off of Colfax on the far side of the park relative to the individual, and proceeded west upon a dirt service road which traversed the park. Complainant traversed the park, traveling from the eastern edge of the park toward the western edge, at an idle speed, looking for the individual he had previously seen.

14. Upon reaching a playground, located in the approximate area where the individual had first been seen, Complainant saw two individuals, an adult male later identified as Aaron Rosco ("Rosco") and Rosco's 4 year old daughter. Rosco and his daughter were located within the playground area which was slightly elevated and surrounded by railroad ties.

15. After coming within 10 - 15 feet of Rosco and his daughter and noting that these were not the individuals he was looking for, Complainant proceeded past Rosco and his daughter and exited the park by driving off the curb and onto Franklin Street. While exiting the park, Complainant received a radio call from Trujillo indicating that the juveniles had been sighted in another location a few blocks away. Complainant accelerated as he exited the park and entered Franklin Street.

16. That same day, Rosco called the Pueblo police department to complain about

the incident. That complaint was subsequently reported to Chief Lee Smith, Complainant's appointing authority.

17. The juveniles were eventually spotted and the Complainant and Trujillo attempted to capture both on foot. In the course of the pursuit, Trujillo was able to capture the male juvenile. The female juvenile could not be captured by Complainant.

18. Trujillo placed the male juvenile in Complainant's CMHIP police vehicle, hands cuffed behind his back. Trujillo failed to fasten the male juvenile's seat belt.[1] Complainant also failed to fasten the seat belt. As a result, in the course of a pursuit or erratic driving, the juvenile was at risk of being bounced around the rear passenger compartment of the vehicle.

19. Complainant established a repoir with the male juvenile and was able to solicit from him possible locations of the female juvenile. As a result, the male juvenile was not immediately returned to CMHIP. Rather, Complainant continued his search. Based upon information received from the male juvenile, Complainant stopped at a nearby grocery store to inquire as to whether any of its staff had seen the female juvenile. In so doing, Complainant left the male juvenile unaccompanied in the back seat of the patrol car.[2]

20. Subsequently, Trujillo spotted the female juvenile and radioed that she was near the Auto-Glow Carwash ("carwash"). The carwash was located in a block bordered by 29th Street (a two-way street) on the north, northbound Elizabeth Street on the west (Elizabeth Street is a divided, four lane, two-way street with a median in between the north and southbound lanes), 28th Street on the south (two-way), and an alley on the east. Across from the carwash, on the west side of Elizabeth Street, were a number of shops including a gas station, motel, and convenience store ("westside shops"). All the stores had individual parking lots. Each lot was connected by an asphalt frontage strip. Cars entering the carwash entered from Elizabeth Street (northbound) and traveled south through the carwash.

21. As Complainant drove north, up the alley on the east side of the carwash, he spotted the female juvenile. At that point, he entered the carwash at the southeast corner and proceeded against the flow of carwash traffic. As he traveled through the carwash area, he proceeded through the middle of three

1 Officer Trujillo did not receive a corrective action nor was he disciplined for failing to seatbelt the juvenile.
2 The CMHIP vehicle had a wire partition between the rear passenger section and the front section. As is common practice, the door handles of the rear passenger section had been removed. The rear doors could only be opened from the outside.

auto vacuuming stations in the wrong direction. Complainant then proceeded north, continuing against the flow of carwash traffic to the entrance of the carwash and exited.

22. While traveling through the carwash, Complainant had his emergency lights activated as noted by various witnesses. As Complainant traversed the carwash, he activated his emergency lights and intermittently activated his siren.

23. Complainant's actions as he traversed the carwash were observed by the carwash owner/manager, Guy Case ("Case") and the following individuals at or near the carwash: Donna Shelinbarger, Betty J. Baker, Justin Sturtevant, and Shannon Carpio. On the same day, Case called Chief Smith to complain about the incident. Case eventually sent correspondence to Capt. Don Allen of the Department of Safety at CMHIP complaining about Complainant's actions and expressing concern that his customers and employees may have been put in jeopardy.

24. Complainant noted that as he exited the carwash, the juvenile had crossed the northbound lanes of Elizabeth Street, and was crossing the median between northbound and southbound Elizabeth Street, heading west. Complainant noted that 29th Street, north of his location was congested but that the northbound lanes of Elizabeth Street were devoid of traffic.

25. Complainant activated his siren and proceeded southbound, in the northbound lanes, on Elizabeth Street, intending to cut off the juvenile. He proceeded southbound, turned left onto 28th street, and then turned left again, heading north and entering the southbound lanes of Elizabeth Street.

26. Complainant paused in the middle of the southbound lanes of Elizabeth Street in order for oncoming traffic to see his emergency lights .

27. Complainant then proceeded north in the southbound lanes of Elizabeth and entered the frontage area of the westside shops. He proceeded to patrol this frontage area. In so doing, Complainant traveled north on the frontage area, exited the frontage area near 29th street, proceeded southbound in the southbound lanes of Elizabeth Street, and re-entered the frontage area.

28. Eventually, based on information provided by witnesses, the female juvenile was captured. Complainant returned the male and female juveniles to CMHIP. In so doing, Complainant never indicated that he feared that the female juvenile might have been a threat to herself as she fled CMHIP.

29. On April 17, 1997, the supervising officer, Captain Don Allen, commenced an investigation of the events of April 16, 1997 based on the fact that Chief Smith had received two phone calls lodging complaints against CMHIP officers.

30. Subsequent to the events of April 16, 1998, the working schedule of Complainant was modified. Such modifications included omitting Complainant's rank from the posted work schedule despite other employees' ranks being included. In addition, the computer screen which was accessible to a variety of CMHIP public safety staff, had a screen saver which was modified to read that Complainant was a loser and would not be in his position much longer.

31. Based on Capt. Allen's investigation, Chief Deputy Pinelle completed a Supplemental Report and concluded that Complainant violated provisions of section 42-4-1401, C.R.S. and thereby committed traffic violations.

32. In addition to the report, because this matter occurred off CMHIP premises, a Charge Request Form was completed and forwarded to the District Attorney's office in Pueblo, CO.

33. In the course of the investigation, Fairmount Park was examined and measurements made in order to determine how close Complainant's patrol car was to Rosco and his little girl based upon Rosco's complaint. The investigation on this issue was incomplete as a result of having measured the wrong location. Instead of measuring the distance between Rosco's location and the path of the vehicle, the distance between the playground area and Franklin Street was measured.

34. On June 6, 1997, an R8-3-3 meeting was convened by Lee Smith, Chief of Public Safety and Complainant's appointing authority.

35. On June 12, 1997, a termination letter was sent to Complainant from Smith. The letter stated that the discipline imposed upon Complainant was based on Complainant's (1) failure to comply with standards of efficient service or competence, (2) willful misconduct which may include either a violation of the Board rules or the rules of the agency of employment, and (3) the violation of law, policies, rules, or procedures relating to the State Personnel System in a manner which materially affects the Complainant's ability to perform the job. Effective June 13, 1997, Complainant's employment with CMHIP was terminated.

36. In concluding that discipline was necessary, Smith relied upon the incident involving Rosco at Fairmount Park, the incident at the Auto-Glow carwash, the driving which occurred on Elizabeth Street following Complainant's departure

from the carwash and that the male juvenile was handcuffed, but not restrained, within the back seat of the patrol car during the search for the female juvenile.

37. On November 18, 1997, deputy district attorney Curtis Burchett initiated the prosecution of the charges against Complainant based on the incidents of April 16, 1997. All of the charges were dropped with the exception of the reckless driving charge. Subsequently, Complainant entered an ***Alford*** plea of guilty to the charge of reckless driving. An *Alford* plea is one in which a defendant accepts the plea of guilty because there is sufficient evidence of the factual basis for the charge so that a conviction could result from trial.

38. Section 42-4-1401, C.R.S. provides in relevant part:

> (1) Any person who drives a motor vehicle, . . . in such a manner as to indicate either a *wanton or a willful disregard* for the safety of persons or property is guilty of reckless driving . . .
>
> .
>
> (2) Any person who violates any provision of this section commits a class 2 misdemeanor traffic offense.

(emphasis added).

39. Section 42-4-108, C.R.S., Public officers to obey provisions-exceptions for emergency vehicles, provides in relevant part:

> 1. The provisions of this article (Regulation of vehicles and traffic) . . . shall apply to the drivers of all vehicles owned or operated by. . . the state . . . , subject to such specific exceptions as are set forth in this article with reference to authorized emergency vehicles.
>
> 2. The driver of an authorized emergency vehicle, when responding to an emergency call, or when in pursuit of an actual or suspected violator of the law, . . . may exercise the privileges set forth in this section, but subject to the conditions stated in this article.

The privileges include being able to proceed past a red or stop signal or stop sign, exceeding lawful speeds, and disregarding regulations governing directions of movement or turning is specific directions. The section further states that emergency lights and siren may not always be necessary.

40. CMHIP's Dept. of Public Safety Policy 5.01.01 recites the basic responsibilities of police officers:

The basic responsibilities of Police Officers are listed as follows in priority order:

1. Protection of patients, employees, and all other persons on the grounds of the Colorado Mental Health Institute at Pueblo.

2. Protection of state property on the grounds of the Colorado Mental Health Institute at Pueblo.

3. Enforcement of CMHIP Rules and Regulations, and Colorado Revised Statutes, on the grounds of the Colorado Mental Health Institute at Pueblo.

4. Enforcement of Colorado Motor Vehicle Laws, on the grounds of the Colorado Mental Health Institute at Pueblo.

41. In October 1994, a Multi-Jurisdictional Police Pursuit Policy - Pueblo County was entered into between CMHIP, the Pueblo County Sheriff's Dept., Colorado State Patrol, and the Division of Parks and Outdoor Recreation at Lake Pueblo State Park. The policy outlined the terms and conditions to be followed in the event police officers from any one agency, in the course of a pursuit of a suspect, entered another party's jurisdiction. The policy primarily addresses pursuits which involve more than one vehicle. Its scope is such that it includes all peace officers within the parties' jurisdictions. In addition, the policy specifically provides that the policy does not relieve police officers, in the course of a pursuit, from their obligations in driving an emergency vehicle from driving with due regard for the safety of all persons and that the driver is not relieved from the consequences of his reckless disregard for the safety of others. The policy states that:

> The decision to pursue is not irreversible, and officers must continually evaluate whether the seriousness of the crime justifies continuing the pursuit. . . . .

Complainant knew or should have known of the policy and its terms.

42. IT WAS A GENERALLY ACCEPTED STANDARD OF CMHIP PROCEDURE TO HAVE ALL OCCUPANTS RESTRAINED BY SEATBELT WHILE BEING TRANSPORTED IN A CMHIP VEHICLE.

DISCUSSION

Certified state employees have a property interest in their positions and may only be terminated for just cause. *Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994*). Such cause is outlined in State Personnel Board Rules R8-3-3 (C) and generally includes: (1) failure to comply with standards of efficient service or competence; (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment; (3) willful failure or inability to perform duties assigned; and (4) final conviction of a felony or any other offense involving moral turpitude.

In this disciplinary action of a certified state employee, the burden of proof is on the terminating authority, not the employee, to show by a preponderance of the evidence that the acts or omissions upon which discipline was based occurred and just cause existed so as to impose discipline. *Department of Institutions v. Kinchen,* 886 P.2d 700 (Colo. 1994).

In *Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987), the Supreme Court of Colorado held that:

> Where conflicting testimony is presented in an administrative hearing, the credibility of witnesses and the weight to be given their testimony are decisions within the province of the agency.

Respondent contends that the termination of Complainant's employment was not arbitrary and capricious or contrary to rule or law. Respondent argues that Complainant's actions put the community at risk by driving recklessly through Fairmount Park, almost hitting a small girl, by traveling through the AutoGlow carwash at a high rate of speed in the wrong direction, and by traveling in the wrong direction at an excessive speed down Elizabeth Street. In addition, Respondent maintains that by failing to use a passenger restraint or seatbelt with the male juvenile, Complainant needless endangered the juvenile. Respondent argues that these actions threatened the safety of members of the Pueblo community and residents of CMHIP. CMHIP maintains that the appointing authority, Lee Smith, was under an obligation to impose discipline in order to protect the people who work and reside at CMHIP and the citizens of Pueblo, CO. The level of discipline imposed was termination as a result of Complainant failing to correct his behavior, vis-a-vis driving a CMHIP vehicle. Based on his previous corrective action, Respondent's decision was to terminate Complainant's employment. In addition, Respondent maintains that because Complainant subsequently entered an Alford plea to the charge of reckless driving, he has admitted his conduct was reckless and that his admission and plea, as a matter of law, dictate that he committed the acts for which discipline was imposed.

Complainant argues that Complainant did not put the community at risk and that the behavior of the Complainant was consistent with his responsibilities as a member of the CMHIP Department of Public Safety. Complainant maintains that his actions were an appropriate response in attempt to locate and return the missing juveniles. Complainant maintains that he did not put anyone at risk while he traversed Fairmount Park. He contends he traveled through the park at a safe rate of speed on a service road. He argues that it was appropriate to not return the male juvenile to CMHIP after his capture because the juvenile might be able to assist the CMHIP officers in locating the female juvenile. Complainant maintains that the failure to restrain the male juvenile was an oversight which occurred as a result of Sgt. Trujillo placing the juvenile in Complainant's patrol vehicle. Complainant further argues that his actions in driving through the AutoGlow carwash did not put any individuals at risk and that his emergency equipment was activated putting individuals in the area on notice of an emergency. Because of his concern over the female juvenile's safety and his need to protect her, Complainant maintains that his actions in proceeding down Elizabeth Street in the wrong direction were appropriate. In order to quickly respond to the situation, he had no other choice but to travel in that direction. The fact that no one was harmed and that no property was damaged demonstrates, according to Complainant, that his actions were not reckless. Even if the actions were reckless, the fact that no harm or damage occurred should limit the level of discipline imposed. Complainant maintains that his conviction of reckless driving, in relation to these events, should not influence or otherwise impact the consideration as to whether or not he committed the acts for which discipline was imposed.

I.

A.
Collateral Estoppel and The Acts for Which Discipline was Imposed

During closing argument, Respondent raised the issue that as a matter of law through the doctrine of collateral estoppel, Complainant must be considered as having committed the acts for which discipline was imposed. This argument is derived from the fact that Complainant entered a *Alford* plea of guilty to the charge of reckless driving in November, 1997. Complainant argued that collateral estoppel does not apply in this administrative setting. As a result, the ALJ ordered that the parties submit legal briefs or memoranda on the issue.

Collateral estoppel is a legal concept recently reiterated in *Leahy v. Guaranty National Insurance Co.*, 907 P.2d 697 (Colo. App. 1995):

Collateral estoppel, or issue preclusion, bars relitigation of an issue determined in

> a prior proceeding if: (1) the issue precluded is identical with an issue actually determined in a prior proceeding; (2) the party against whom estoppel is asserted has been a party to or in privity with a party in the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted has had a full and fair opportunity to litigate the issue in the prior proceeding.

Application of this doctrine mandates that Complainant committed the act of reckless driving on April 16, 1997. Thereby, Complainant failed to meet standards of efficient service or competence in the operation of the CMHIP patrol vehicle and failed to follow the Multi-jurisdiction Police Pursuit Policy.

Complainant maintains he entered a plea of *nolo contendre*, pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970) to the charge of reckless driving, section 42-4-1401, C.R.S. The prosecuting district attorney states that the record reflects a plea of guilty was entered pursuant to Alford. In Alford, the United States Supreme Court held that a court may accept a guilty plea despite a defendant's insistence of his innocence if there is strong evidence in the record to support a plea of guilty. By entering into such a plea, a defendant waives his right to trial and is subject to the imposition of the appropriate penalty as if the defendant plead guilty. In this matter, Complainant entered such a plea nearly six months after being terminated from his position. However, Complainant had filed his appeal timely and was aware that an administrative proceeding was pending with regard to his actions on April 16, 1997.

In applying the four-part test for the application of collateral estoppel, it is clear that Complainant is barred from relitigating this issue of whether or not his driving was reckless. First, the issue precluded is identical with an issue actually determined in the prior proceeding. Complainant was terminated as a result of his actions on April 16, 1997 which included Complainant's failure to comply with standards of efficient service or competence. As recited in his termination letter, Complainant was found by the appointing authority to have violated the standards of efficient service or competence by his actions, including his drive through Fairmount Park, his pursuit of the female juvenile through the AutoGlow carwash, and his traveling in the wrong direction on Elizabeth Street. The issue involved, as viewed by the appointing authority, was that Complainant's actions while driving were reckless and endangered CMHIP employees, the juveniles, and the citizens of Pueblo, CO. For instance, the appointing authority found that Complainant's action of driving through the carwash was "completely unwarranted and reckless behavior and constitutes willful misconduct." (Exhibit 1). By entering a plea to the reckless driving charge in November, Complainant admited he committed the act of reckless driving, defined as driving with a *wanton or a willful disregard* for the safety of persons or property. In other words, the issue of Complainant's reckless driving behavior was actually determined in the prior proceeding

and is identical to one of the issues for which he was disciplined. His actions on April 16, 1997 were reckless in driving a vehicle and as a result, would constitute violations of efficient service or competence and the Multi-jurisdiction Police Pursuit Policy of CMHIP. The underlying issue in both proceedings is addressed and is identical.

In applying the second element of the four-part test, one must determine if the party against whom estoppel is asserted has been a party to or is in privity with a party in the prior proceeding. In this instance, it is clear that the party, Complainant, was the same in both this proceeding and the proceeding in Pueblo, CO. The third element of the test is satisfied in that a final judgment on the merits in the prior proceeding has occurred. And, fourth, it is clear that the party against whom the doctrine is asserted, Complainant, had a full and fair opportunity to litigate the issue in the prior proceeding.

Complainant argues in his brief that the doctrine of collateral estoppel does not apply in this administrative proceeding. Complainant relies on the application of Colorado case law and statute prohibiting the use of a *nolo contendre* - Alford plea against an individual in a subsequent civil matter. This ALJ is not persuaded.

Complainant cites section 42-4-1713, which prohibits the use of a traffic conviction in any court in any civil action, for the proposition that the plea entered cannot be used as evidence in this administrative proceeding. However, it is clear that administrative proceedings do not equate to civil proceedings. Respondent persuasively argues that this tribunal is not the equivalent of a civil court and that had the legislature intended for traffic convictions to be barred from being used as evidence in an administrative proceeding, the statute would have reflected such. (See: *Section 8-74-108,C.R.S. in which legislature specifically stated that unemployment decisions could not be introduced into evidence in any judicial, administrative, or other action.*)

Complainant relies on the Criminal Procedure Code and the Colorado Rules of Criminal Procedure to argue that it is prohibited to use the evidence of a criminal plea in a subsequent administrative proceeding, citing section 16-7-303, C.R.S. and Colo. R. Crim. P. 11(f)(6). This argument fails because this portion of the criminal code and rules addresses plea discussions or the actual plea agreement. The criminal code and the rules do not exclude the actual plea from being introduced as evidence. In other words, while the actual discussions which lead to the plea or the terms of the agreement between the district attorney and Complainant may not be introduced into evidence, the plea itself may be entered into evidence. To conclude otherwise would be to interpret the Criminal Procedure Code and Rules of Criminal Procedure in such a way that any previous convictions of a criminal, if entered into through a plea discussion, could never be introduced into evidence. In the alternative, even if such evidence could have been precluded in this administrative proceeding, Complainant waived any such preclusion by introducing the fact that a plea to reckless driving occurred through the testimony of

Complainant's own witness, deputy district attorney C. Burchett. Complainant failed to raise any objection to such testimony.

In *Cortese v. Black*, 838 F. Supp. 485 (D. Colo. 1993), the court addressed the issue of a nolo contendre-Alford plea and held that there are collateral consequences associated with the entry of ***any*** Alford plea. The court held:

> Under an Alford plea, a defendant maintains innocence while entering a plea of guilt because the defendant concludes that his interests require entry of a guilty plea and the record before the court contains strong evidence of actual guilt. A guilty plea is an admission of all the elements of the criminal charge. Guilty pleas must be rooted in fact before they may be accepted. Accordingly, courts treat Alford pleas as having the same preclusive effect as a guilty plea. The collateral consequences of a guilty plea may not be avoided by the simultaneous assertion of innocence. [Therefore,] . . . an Alford plea has the same preclusive effect as a guilty plea.

(citations omitted). In this case, under the doctrine cited in *Cortese*, preclusive effect applies and the doctrine of collateral estoppel is applicable as all of the elements for such exist.

Complainant further argues that his right to due process is abrogated by applying the doctrine of collateral estoppel in this administrative proceeding. Complainant relies upon *In The Matter of McLenden*, 845 P.2d 1006, 1011 (Wash. 1993) for this proposition. Yet, Complainant has not been deprived of due process. Complainant was able and participated in the proceeding in Pueblo, CO regarding the reckless driving charge and, therein, exercised his due process rights on the issue. In addition, Complainant exercised his procedural due process rights by appealing his termination and participating in an evidentiary hearing to determine the merits of his termination and the level of discipline imposed. The fact that the plea entered on the charge of reckless driving did not occur until after the appointing authority made his decision to impose discipline and that this tribunal is bound to accept the elements of that plea does not deny Complainant due process.

B.
Restraint of Male Juvenile

Policy 5.01.01 states that the first priority of a CMHIP police officer is to protect the patients, employees and other persons on the grounds of CMHIP. Testimony was solicited from Chief Smith and Deputy Chief Pinelle that it was CMHIP's standard of practice to restrain any patient with a seatbelt while transporting that patient. In this

instance, after having captured the male juvenile, Complainant failed to ensure that the male juvenile was restrained by a seatbelt and thereby failed to protect the juvenile. The magnitude of this failure is enhanced by the fact that after having the male juvenile placed in his patrol vehicle, Complainant failed to return him to CMHIP and continued the search for the female juvenile.

~~However,~~ Policy 5.01.01 recites the priorities of a police officer while on CMHIP grounds. It does not address the priority of responsibilities which arise off CMHIP grounds. In addition, the standard of practice of seatbelting a passenger is not formalized in any CMHIP policy introduced as evidence, nor is it mandated by sections 42-4-236 or 42-4-237, C.R.S. in this instance because the passenger was in the rear seat in a state-owned vehicle. CMHIP had no policy on point except to offer testimony that it was a standard of practice to seatbelt all resident/patients of CMHIP. ~~As a result, it cannot be found that Complainant failed to comply with standards of efficient service or competence or acted with willful misconduct in failing to seatbelt the male juvenile.~~

HOWEVER, CMHIP, VIA THE APPOINTING AUTHORITY, HAD ESTABLISHED AN INTERNAL POLICY WHICH MANDATED THAT ALL OCCUPANTS OF A CMHIP VEHICLE NEED TO BE RESTRAINED BY SEATBELT WHEN BEING TRANSPORTED. IN *BISHOP V. DEPT. OF INSTITUTIONS*, 831 P.2D 506 (COLO. APP. 1992), THE COURT OF APPEALS UPHELD THE STATE PERSONNEL BOARD IN DETERMINING THAT **WILLFUL MISCONDUCT** CAN OCCUR, DESPITE THERE BEING NO SPECIFIC RULE OR POLICY ON POINT FOR A SPECIFIC ACT, IF THE CONDUCT IS IN VIOLATION OF STATE STATUTE, THE GENERAL PROVISIONS OF A POLICY MANUAL, OR GENERALLY ACCEPTED STANDARDS OF PERFORMANCE. IT IS NOT ARBITRARY AND CAPRICIOUS TO ADOPT AND APPLY THE HOLDING IN *BISHOP* TO ACTS WHICH CONSTITUTE FAILURE TO MEET THE **STANDARDS OF EFFICIENT SERVICE OR COMPETENCE.** IN THIS INSTANCE, COMPLAINANT VIOLATED A STANDARD OF PRACTICE/PERFORMANCE ESTABLISHED BY CMHIP.

II.
Level of Discipline

The discipline imposed was NOT within the range of reasonable alternatives available to the appointing authority. In determining the level of discipline to be imposed, a number of elements must be considered. State Personnel Board Rule R8-3-1, 4 CCR 801-1 encourages progressive discipline. The rule provides that the decision to correct or discipline an employee shall be governed by (1) the nature, extent, seriousness and effect of the act, error or omission committed; (2) the type and frequency of the previous undesirable behavior; (3) the period of time that has elapsed since a prior offensive act; (4) the previous performance evaluation of the employee; (5)

an assessment of information obtained from the employee; (6) any mitigating circumstances; and (7) the necessity of impartiality in relations with employees. The rule further states that unless the conduct is so flagrant or serious that immediate disciplinary action is appropriate, corrective action shall be imposed before resorting to disciplinary action. The imposition of the level of discipline is also a matter to be determined by the appointing authority and the appointing authority is presumed to make such decisions regularly and appropriately. See: *Chiappe v. State Personnel Board*, 622 P.2d 527, 532-533 (Colo. 1981), *State Personnel Board v. District Court In and For City and County of Denver*, 637 P.2d 333 (Colo. 1981).

In this matter, Complainant admitted through his plea to some of the conduct for which discipline was imposed. He acted recklessly and with wanton disregard for the safety of the public and the juveniles involved. Complainant admitted to reckless driving. He had been disciplined in relation to his driving on one previous occasion in 1992. Contemporaneously, Complainant's performance evaluations for the past 10 years have been above standard to commendable. He has received specific letters or references over his career which demonstrate that he can de-escalate potentially violent situations. The discipline which he received in the past was five years ago and he successfully completed the remedial driver training program. Complainant perceived himself as having an obligation to search for the juveniles and, to the extent possible, prevent them from being harmed as outlined in CMHIP's Policy 5.01.01. Although it was not determined that the juveniles posed a threat to themselves or the public or that the actions of the female juvenile, in fleeing from Complainant at the carwash, rose to such a level as to allow Complainant to conclude she was a threat to herself, the fact that Complainant was directed through dispatch to return the juveniles provided sufficient justification for his pursuit of the children off CMHIP grounds.

In this instance, no individuals were harmed and no property damage occurred. Complainant's search through Fairmount Park did not endanger any individuals. Complainant's traversing of the carwash and Elizabeth Street, while admittedly reckless, was with lights and siren, warning individuals that a situation existed and that they needed to proceed with caution. With regard to the male juvenile, the failure to seatbelt the male juvenile while continuing the search and eventually transporting the juvenile back to CMHIP cannot, IN AND OF ITSELF, be viewed as flagrant and serious given these circumstances.

THE FAILURE TO SEATBELT THE JUVENILE, WHEN COMBINED WITH THE OTHER ACTS, CANNOT BE VIEWED AS MAKING THE ACTS, AS A WHOLE, SO SERIOUS AND FLAGRANT AS TO SUPPORT TERMINATION. SUCH IS EMPHASIZED BY THE FACT THAT ANOTHER OFFICER WAS INVOLVED IN PLACING THE MALE JUVENILE IN THE CMHIP VEHICLE. HE DID NOT RECEIVE ANY CORRECTIVE ACTION OR DISICPLINARY ACTION AS A RESULT OF HIS

ROLE. YET, HE WAS ALSO OBLIGATED TO PROTECT THE RESIDENTS OF CMHIP AND WAS ALSO REQUIRED TO ABIDE BY ANY GENERALLY ACCEPTED STANDARDS OF PERFORMANCE AS DETERMINED BY THE APPOINTING AUTHORITY. THUS, THE LEVEL OF DISCIPLINE IMPOSED UPON COMPLAINANT DOES NOT REFLECT THAT THE APPOINTING AUTHORITY PROCEEDED WITH IMPARTIALITY IN RELATIONS WITH EMPLOYEES WHEN DETERMINING WHETHER OR NOT DISCIPLINE SHOULD BE IMPOSED.

~~The conduct of the Complainant cannot be viewed as to be so flagrant or serious to warrant disciplinary termination.~~ Given the elements outlined above, Complainant successfully rebuts the presumption that the appointing authority made the decision to impose disciplinary termination appropriately. State Personnel Board Rule R8-3-1 mandates that progressive discipline should have been imposed.

III.
Delegated Appointing Authority
and
Arbitrary, Capricious or Contrary to Rule or Law Actions

The delegation of appointing authority was conducted pursuant to the State Personnel Board rules and the actions of Respondent were not otherwise arbitrary, capricious, or contrary to rule or law. Complainant argues that the appointing authority acted arbitrary and capriciously or contrary to rule or law based on the fact that: (1) Complainant's previous history with management in 1993, 1994, and 1995 improperly influenced the appointing authority's decision; (2) Complainant's schedule had been altered demonstrating the appointing authority's pre-disposition to terminate Complainant; and (3) that screen saver messages appeared on a shared computer screen further demonstrated the appointing authority's pre-disposition to terminate Complainant. While not condoning such events, the evidence presented fails to persuade this ALJ that such incidents are so demonstrative as to show that the appointing authority acted arbitrarily or capriciously or contrary to rule or law.

CONCLUSIONS OF LAW

1. To the extent the Complainant engaged in reckless driving, Complainant engaged in the acts for which discipline was imposed and such acts constituted a failure to meet the standards of efficient service or competence. WITH REGARD TO THE FAILURE TO RESTRAIN THE MALE JUVENILE, COMPLAINANT ALSO ENGAGED IN THE ACTS FOR WHICH DISICPLINE WAS IMPOSED

AND SUCH ACTS CONSTITUTED A FAILURE TO MEET THE STANDARDS OF EFFICIENT SERVICE OR COMPETENCE.

2. The discipline imposed was not within the range of reasonable alternatives available to the appointing authority and the discipline imposed was in violation of Board Rule R8-3-1.

3. The delegation of appointing authority was conducted pursuant to the State Personnel Board rules.

4. The actions of Respondent regarding consideration of previous disciplinary history, the posting of schedules, and the computer screen saver were not arbitrary, capricious, or contrary to rule or law.

ORDER

1. Respondent is directed to rescind the June 12, 1997 disciplinary termination of Complainant's employment.

2. Respondent shall reinstate Complainant to the position he held at the time of his wrongful termination. Corrective or disciplinary action may be imposed based upon the findings of fact in this matter but such corrective or disciplinary action shall not include termination or demotion below the position of police officer II. Complainant shall be awarded back pay and benefits from the time of his termination, offset by (1) any amounts earned by Complainant subsequent to his termination and (2) offset by any lesser discipline imposed which may impact his pay.

3. Neither party is entitled to an award of attorney fees as provided in section 24-50-125.5, C.R.S.

Dated this ~~1ST~~ 26TH day
of May, 1998
at Denver, Colorado

G. Charles Robertson
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 2 inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on this _____day of May, 1998, I placed true copies of the foregoing **ORDER GRANTING PETITION FOR RECONSIDERATION, *IN PART* and AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

David J. Bruno, Esq.
Bruno, Bruno & Colin, P.C.
1560 Broadway, Suite 1099
Denver, CO 80202-5143

and in the interagency mail, addressed as follows:

Stacy Worthington
Assistant Attorney General
State Services Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

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